

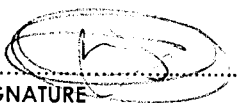
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

3/11/16.

CASE NO: 97574/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	DATE 03/11/2016

UNIVISION SERVICES ASSOCIATION NPC
VACATION RECREATIONAL SERVICES
QUALITY TIME MARKETING (PTY) LTD
QUALITY VACATION CLUB
AFRICAN CLUB INNOVATIONS
MULTI DESTINATION CLUB
LIFESTYLE VACATION CLUB
AFRICAN VACATION CLUB
VIP EXPRESS
MILCAR DEVELOPMENT CC
INVESTAGE 192 (PTY) LTD

1st APPLICANT
2nd APPLICANT
3rd APPLICANT
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6th APPLICANT
7th APPLICANT
8th APPLICANT
9th APPLICANT
10th APPLICANT
11th APPLICANT

AND

THE NATIONAL CONSUMER TRIBUNAL
THE NATIONAL CONSUMER COMMISSION

1st RESPONDENT
2nd RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

- [1] This is an application in terms of the Promotion of Administrative Justice Act, 3 of 2000, for judicial review of a decision taken by the first respondent not to award costs to the applicants in an application brought before it by the second respondent.
- [2] The following brief background is necessary;
- 2.1. The second respondent brought an application before the first respondent. In that application the second respondent sought an order in terms of which certain conduct of the applicants would be declared "prohibited conduct". The details of the conduct are not necessary for purposes hereof.
 - 2.2. The aforesaid application was by notice, on the morning of day one of the three day hearing, withdrawn. In the notice of withdrawal, the second respondent did not make a tender for costs.
 - 2.3. Aggrieved at this, applicants launched an application in terms of which an order was sought for the award of costs in their favour. The application was launched before the first respondent and was opposed by the second respondent.
 - 2.4. The tribunal, first respondent, having heard arguments and submissions found that the National Credit Act, Act 34 of 2005, does not allow the awarding of costs in the matter. For that reason, it refused the application for the award of costs and directed that each party pay its own costs.

2.5. The applicants, who were clearly dissatisfied at the state of affairs, launched an application for the review and setting aside of the decision of the first respondent, the tribunal. In the notice of motion the following loosely stated orders are sought;

2.5.1. That the decision refusing an award of costs be reviewed and set aside;

2.5.2. That the matter be remitted back for reconsideration;

2.5.3 That the second respondent be directed to pay costs of the review and that the first respondent do so in the event it opposes the application

2.6. The review application is opposed by the second respondent. The first respondent has filed a notice to abide.

[3] The above summary is common cause.

Applicable legal framework

[4] The genesis of current proceedings is the referral, by the second respondent of a matter in terms of section 73 (2) (b) of the **Consumer Protection Act, 68 of 2008**. The section reads as follows;

"Outcome of investigation

73. (1) *After concluding an investigation into a complaint, the Commission may;*

(a) *issue a notice of non-referral to the complainant in the prescribed form;*

(b) *refer the matter to the National Prosecuting*

Authority, if the Commission alleges that a person has committed an offence in terms of this Act; or

(c) if the Commission believes that a person has engaged in prohibited conduct—

(i) refer the matter to the equality court, as contemplated in section 10, if the complaint involves a matter in terms of Part A of Chapter 2;

(ii) propose a draft consent order in terms of section 74;

(iii) make a referral in accordance with subsection (2); or

(iv) issue a compliance notice in terms of section 100.

(2) In the circumstances contemplated in subsection (1)

(c) (iii), the Commission may refer the matter—

(a) to the consumer court of the province in which the supplier has its principal place of business in the Republic, if—

(i) there is a consumer court in that province; and

(ii) the Commission believes that the issues raised by the complaint can be dealt with expeditiously and fully by such a referral; or

(b) to the Tribunal;"

- [5] With regard to referral of matters before the tribunal, the Consumer Protection Act provides that;

"Referral to Tribunal

75. (1) *If the Commission issues a notice of non-referral in response to a complaint, other than on the grounds contemplated in section 116, the complainant concerned may refer the matter directly to-*
- (a) the consumer court, if any, in the province within which the complainant resides, or in which the respondent has its principle place of business in the Republic, subject to the provincial legislation governing the operation of that consumer court; or*
 - (b) the Tribunal, with leave of the Tribunal.*
- (2) *If a matter is referred directly to a consumer court in terms of subsection (1), the respondent may apply to the Tribunal, in the prescribed manner and form and within the prescribed time, for an order that the matter be referred to the Tribunal, and the provisions of section 73(4) apply to such an application.*
- (3) *A referral to the Tribunal, whether by the Commission or by a complainant in terms of subsection (1), must be in the prescribed form.*
- (4) *The Tribunal-*

- (a) *must conduct a hearing into any matter referred to it under this Chapter, in accordance with the requirements of this Act, and the applicable provisions of the National Credit Act pertaining to the proceedings of the Tribunal; and*
- (b) *may make any applicable order contemplated in this Act or in section 150 or 151 of the National Credit Act, read with the changes required by the context."*

[6] Regulation 19 of the Regulations for matters Relating to the Functions of the Tribunal and Rules for the Conduct of Matters Before the National Consumer Tribunal, reads as follows;

"Withdrawal of matters

19. (1) *An Applicant, before an application has been decided, may withdraw all or part of the application by-*
- (a) *serving a notice of withdrawal in Form Tl.r19 by hand delivery, fax or email; and*
 - (b) *filing with the Registrar a copy of the notice of withdrawal with proof of service.*
- (2) *A notice of withdrawal may include a consent to pay costs, or the other party may apply to the Tribunal for an order for costs."*

[7] Section 147, of the National Credit Act, 34 of 2005, states the following with regard to costs;

"Costs

147. (1) *Subject to subsection (2), each party participating in a hearing must bear its own costs.*

(2) *If the Tribunal-*

(a) *has not made a finding against a respondent, the member of the Tribunal complainant who referred the complaint in terms of section 141(1); or section 75 (1) (b) of the Consumer Protection Act, 2008, as the case may be; or*

(b) *has made a finding against a respondent, the member of the Tribunal presiding at a hearing may award costs against the respondent and to a complainant who referred the complaint in terms of section 141(1) or section 75 (1) (b) of the Consumer Protection Act, 2008, as the case may be."*

Applicants' submissions

[8] The applicants submit that the finding by the tribunal to the effect that it does not have the power to grant costs, amounts to an error of law. The applicants are of the view that where a notice of withdrawal has been filed without a cost tender, in that event an application may be brought before the tribunal by the aggrieved party for an order of costs. The second submission is that from the onset, applicants warned that the application that was brought by the second respondent before the first respondent, is frivolous and vexatious. They indicated at the time in their opposing papers, that they would be asking for a punitive costs order. The applicants make the point that section 147, on which the

tribunal relied in dismissing the application for an award of costs, is not applicable in this case. Put differently, the applicants contend that section 147 applies when there is an application before the Tribunal. They argue that in this instance since the matter was withdrawn, there was no hearing before the tribunal hence its non-applicability. What was before the tribunal, so the argument goes, was an application for the award of costs, which is a separate application.

Respondent's submissions

[9] The second respondent is of the persuasion that the application must fail for the following reasons;

9.1. That the tribunal was correct in its finding that it did not have the power to award costs. This is so because the tribunal is allowed to award costs only in circumstances where the referral is in terms of section 75. Since the referral that led to the application for the award of costs being launched was brought in terms of section 73 (2) of the Consumer Protection Act, the contention is that the tribunal was not clothed with the power to deal therewith when the regulations are interpreted in a manner that is consistent with the empowering provision in the legislation.

9.2. That it can not be successfully argued that the application was vexatious or frivolous. The second respondent argues that the referral was *bona fide* and that it follows that a costs order should not ensue, at all, let alone on a punitive scale. In this regard the submission is that in order to arrive at a conclusion as to whether the second respondent acted vexatiously or frivolously, one must examine the merits of

the referral. The referral, according to the second respondent, had been triggered and preceded by 281 complaints. The second respondent lists the criticism aimed at it by the applicants as follows;

9.2.1. That the deponent to the founding affidavit had used intemperate language and had made unfounded allegations;

9.2.2. That the application was brought frivolously and on hearsay evidence;

9.2.3. that the second respondent had breached the constitution;

9.2.4. That the referral suffered from defects in law.

The issue

[10] The issue for determination is whether the tribunal is correct in its judgment that the NCA does not allow for the awarding of costs in the matter brought before it by the applicants, which judgment is now the subject of this review. If it is, the application should be dismissed. However if it is not, then its decision should be set aside. In that event processes will ensue. The determinative finding of the first respondent is captured in paragraph 22 of its judgment (page 35 of the bundle);

"Section 147 therefore only provides for the awarding of costs in very limited circumstances where a complainant refers a matter to the tribunal after having received a notice of non-referral from the National Credit Regulator or the National Consumer Commission. If the circumstances do not fall within this exception the general rule, that each party bears its own costs, must be observed. This

interpretation is unavoidable because section 147 (1) uses the word "must" and not "may". This indicates that the tribunal is not granted a discretion regarding when it may award costs."

Evaluation

- [11] It is a generally accepted principle of our law that a party that withdraws its action or application, such party is in the same position as an unsuccessful litigant, and therefore the other party is ordinarily entitled to costs. A departure from the principle that costs must be awarded to the party which has been put to the expense of defending withdrawn proceedings, is only warranted in exceptional circumstances. In this regard, see ***ABSA Bank and others vs Robb 2013 (3) SA 619 (GSJ)*** at paragraph [8]; ***Germishuysvs Douglas Besproeiingsraad 1973 (3) 299 (NKA) and Waste Products Utilisation (Pty) Ltdvs Wilkes and Another (Biccari Interested Party) 2003 (2) SA 590 (WLD)*** at 597 A – B.
- [12] In the matter of ***Gamlan Investments (Pty) Ltd and Another vs Trilion Cape (Pty) Ltd 1996 (3) SA 692 (CPD) at 700G*** the court referred with approval to the judgment of ***Jenkins vs SA Boiler Makers, Iron& Steelworkers &Ship Builders Society 1946 WLD 15*** where it was held (as paraphrased by the court in Gamlan) that '*where a disputed application is settled on a basis which disposes of the merits except insofar as the costs are concerned, the Court should not have to hear evidence to decide the disputed facts in order to decide who is liable for costs, but the Court must, with the material at its disposal, make a proper allocation as to costs.*'

- [13] In ***Wildlife & Environmental Society v MEC for Economic Affairs 2005 (6) SA 123 (ECD)*** at 131 B-C, Pickering J, after referring to various authorities, said the following:

"It is clear from the above, in my view, that, even in cases where litigation has been withdrawn, the general rule is of application, namely, that a successful litigant is entitled to his costs unless the Court is persuaded, in the exercise of its judicial discretion upon a consideration of all the facts, that it would be unfair to mulct the unsuccessful party in costs."

- [14] The principles to legal costs were summarised as follows in ***Goldfields Ltd and Others v Motley Rice LLC 2015 (4) SA (GJ)*** at para 29 and 32 :

" The starting point for an analysis of the South African legal position for legal costs is the general rule that:

- (a) In ordinary cases costs should follow the event - the successful party is ordinarily entitled to costs against the unsuccessful party;*
- (b) Costs are awarded in the discretion of the court which may in appropriate cases not award costs to a successful party or even award costs against such party..... The existence of a discretion of the court in all cases (constitutional and otherwise) ensures that the court is always in a position to balance the interest of the parties and to protect its own process, if necessary through costs orders. In this context there is no party which is a priori immune from the court's power to protect its own process through costs*

orders."

- [15] The Constitutional Court has summarized the position pertaining to costs as follows in ***Ferreira v Levin NO and Others 1996 (2) SA 621 CC.***;

"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted is in the discretion of the presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytic accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings."

- [16] The first respondent exercises its powers within the realm of the National Credit Act, the Consumer Protection Act as well as applicable regulations. From the reading of the NCA it is clear that the tribunal is empowered to award costs. This is also common cause between the parties. The divergence however comes where the second respondent is of the view that costs can be awarded only in limited circumstances. In this regard the second respondent contends, this is contained in the opposing affidavit, that the following obtains;

- 16.1. The general principle is that each party must bear its own costs;
- 16.2. The above principle can be deviated from only when there has been a referral in terms of section 141 (1) of the NCA and section 75 (1) of the CPA.
- 16.3. The power of the tribunal to award costs to a respondent is triggered where the tribunal has made no finding against a respondent.

Since the referral of the applicants to the first respondent was neither in terms of section 141 (1) of the NCA nor section 75 (1) of the CPA, it is argued that the first respondent correctly held that it was not empowered to award costs.

[17] I align myself with the contention that the general principle is that each party must pay its own costs. In fact it is more than just an alignment. It is the provision of section 147(1) of the NCA that says so. However it does not end there. The NCA must be read together with applicable regulations, in terms of which in the event of a withdrawal costs may be awarded either by consent or on application. Provision is further made for the award of costs where there is an application brought on the basis of vexatiousness or frivolity. I see no reason why the tribunal should not, when dealing with an application for an award of costs brought after a matter is withdrawn, adjudicate over the application and determine whether or not an award of costs is warranted in the given circumstances. The same bar, would again in my view, not exist where a party seeks such an award of costs on the basis of vexatiousness and frivolity, in which event such costs may be punitive in nature.

[18] At the core of the challenge of the applicants to the finding that the tribunal was not clothed with powers to award costs are two issues. Firstly, the contention that the second respondent does have the power to make a determination. Secondly, that the applicants had been warned from the commencement of the proceedings before the tribunal, of an intention to not only seek costs but to seek such costs on a punitive scale. This court is not at liberty to deal with the question of costs, let alone the punitive nature thereof. This court is called upon to determine if the first respondent does have the power to award costs, in the circumstances of this case, and if the finding is to the effect that it does, to set aside the finding that it does not have such powers and to then remit the matter for reconsideration.

[19] The notice of withdrawal, (page 59 of the paginated pages), reads as follows;

"PLEASE TAKE NOTE THAT the Applicant hereby withdraws the application/referral.

PLEASE TAKE FURTHER NOTE THAT the Applicant does not consent to pay costs, pending the award of costs by the Tribunal."

It seems to me clear that the second respondent was alive to the provisions of regulation 19 particularly subsection 2 thereof, when the notice to withdraw the application or referral was crafted, in terms of which it could have consented to costs. The option second respondent took, was to defer to the tribunal.

[20] In opposing the application, the second respondent has touched on the merits of the matter in an endeavor to show that a costs order is not warranted. Second respondent makes a further point that its actions have always been in good faith and that the accusation of having acted vexatiously or frivolously simply does not stick. While the second respondent is entitled to take the view that punitive costs are not warranted and in making such a submission to make a reference to the merits, that approach is skewed. Determination of the type of costs to be awarded is a secondary issue. At issue in this matter is whether the tribunal is correct in its finding that it can not determine costs.

[21] A litigant that gets hauled before the tribunal and have a matter withdrawn is empowered by the regulations to bring an application for an award of costs. Whether such an award should be made is a matter best left to the tribunal. The primary issue is that it would not be *ultra vires* unlike what the tribunal found.

[22] I do not agree with the submission that the second respondent is not empowered to consider an award of costs. I find that in terms of the regulations the first respondent is empowered to consider an award of costs and that the finding that it is not, falls to be set aside.

[23] I therefore make the following order;

1. the decision of the first respondent made on 16 November 2015, is reviewed and set aside;
2. the application for the award of costs is remitted back to the first respondent to make a decision in respect of the applicants

application for costs against the second respondent;

3. the second respondent is directed to pay costs of this application.



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

Date of hearing	:	25th August 2016
Date of judgment	:	3rd November 2016
Applicant's Counsel	:	Adv. Cohen
First respondent's Counsel	:	Adv. Govender